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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CORNELIUS LAWRENCE POON,

Defendant and Appellant.

C058994

(Super. Ct. No.
06F02788)

Defendant Cornelius Lawrence Poon sexually assaulted and then raped a 22-year-old, developmentally disabled woman in the backseat of a car while his nephew, codefendant Leonard Michael King, laughed and encouraged the attack from the front seat. When defendant was finished, he got out of the car, handed the nephew two \$5 bills, and told him to "make sure [she] don't holler rape." Defendant was convicted by jury on one count of forcible rape in concert (Pen. Code, § 264.1)¹ and one count of

¹ All further statutory references are to the Penal Code unless otherwise indicated.

sexual battery (§ 243.4, subd. (a)). Defendant was sentenced to an aggregate term of 13 years in state prison (the upper term of four years on the sexual battery, plus a full, consecutive upper term of nine years on the rape).

On appeal, defendant contends the trial court prejudicially erred by concluding that full, consecutive terms were mandated by section 667.6, subdivision (d), and that his sentence was therefore unauthorized. The Attorney General concedes that the trial court's sentence was improper under section 667.6, subdivision (d), but asserts the error was harmless because full, consecutive terms were within the trial court's discretion under section 667.6, subdivision (c), and the trial court's remarks at sentencing indicate a more favorable sentence absent the error was not reasonably probable. We reject the Attorney General's concession that the trial court erred in sentencing defendant and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We dispense with a detailed recitation of the underlying facts as they are unnecessary to the resolution of this appeal. However, in order to place the trial court's comments at sentencing in their proper context, we provide a brief overview.

The victim in this case is a developmentally disabled woman to be referred to throughout this opinion as S.D. On the first day of 2006, S.D. was spending time with her best friend, Shenel Simmons. Simmons received a phone call from Leonard Michael King, the brother of her incarcerated boyfriend Brandon King, informing her that King had money he wanted to be placed into

Brandon's account at the county jail. Accompanied by S.D., Simmons drove her red Pontiac Grand Am over to King's apartment to pick up the money. When the two arrived, Simmons left the keys in the ignition and went into the apartment; S.D. awaited her return in the passenger seat. As Simmons discovered that there was actually no money at the apartment to be placed in Brandon's account at the jail, King got in the driver's seat of the Grand Am, locked the doors, and drove away with S.D. still in the passenger seat.

King drove S.D. to several locations before arriving at defendant's residence. S.D. remained in the car while King went into the house and returned to the vehicle with defendant. King then told S.D. to get in the backseat, explaining that they were all going to the store. S.D. complied. Rather than get in the front seat, defendant entered the backseat with S.D. and began to grope her. In tears, S.D. protested and tried unsuccessfully to push defendant away. Undeterred, defendant pushed his weight against S.D. and ran his hands over her breasts beneath her shirt. King laughed and pulled the Grand Am to the side of the house.

S.D. struggled against her attacker until she could fight no longer. Her tears and unheeded protests continued as defendant pulled down her pants and raped her. King laughed and encouraged the attack from the front seat: "Go ahead and do it. Do it. Just finish. Hurry up. She isn't gonna say anything." When defendant was finished, he got out of the car, handed King

two \$5 bills, and told him to "make sure [she] don't holler rape."

After stopping to get some food at a McDonald's restaurant, King drove S.D. back to his apartment. S.D. told Simmons that she wanted to leave right away, and told her about the rape when they reached the car. Simmons then drove S.D. to Mercy San Juan Medical Center, where S.D. was interviewed by police. One of the officers then drove S.D. to UC Davis Medical Center, where a sexual assault examination was performed. Defendant's DNA was a match for semen collected during the sexual assault examination and also matched semen found on the backseat of the Pontiac Grand Am. When police executed a warrant for defendant's arrest, he was found in his residence hiding in the attic.

As already indicated, defendant was convicted by jury on one count of rape in concert and one count of sexual battery. The trial court sentenced defendant to an aggregate term of 13 years in state prison (the upper term of four years on the sexual battery, plus a full, consecutive upper term of nine years on the rape). The trial court's statement of reasons for imposing a full, consecutive term on the rape conviction will be discussed immediately below.

DISCUSSION

Defendant contends the trial court prejudicially erred by concluding that full, consecutive terms were mandated by section 667.6, subdivision (d), and that his sentence was therefore unauthorized. The Attorney General concedes that the trial court's sentence was improper under section 667.6,

subdivision (d), but asserts the error was harmless because full, consecutive terms were within the trial court's discretion under section 667.6, subdivision (c), and the trial court's remarks at sentencing indicate a more favorable sentence absent the error was not reasonably probable. We reject the Attorney General's concession that the trial court erred in sentencing defendant.

Additional Background Information

In pronouncing judgment and sentence, the trial court stated as follows:

"[Defendant], this was a disgusting crime. The evidence of guilt was strong. Your behavior was cowardly and callous on many levels. You took advantage of a particularly vulnerable developmentally disabled victim who was also pregnant. You let your brother [and] sister sit in jail with conduct that you yourself were responsible for.

"Your conduct of having all of the windows in your house covered and taped up, and your conduct of hiding in the attic, evidence of strong consciousness of guilt, and your testimony in court was totally unbelievable.

"I know it's been 17 years since your last criminal conviction, but you have a significant criminal history nonetheless.

"You are not in the same situation as a first offender. You have four misdemeanor convictions, three of them for theft-related offenses, one for DUI and you have two felony convictions[,] both for theft-related offense[s]. Defendant has

now been convicted of rape in concert and sexual battery. These two crimes involve the same victim, but these were two separate crimes. The act of fondling the victim's breasts was separate from the act of raping her.

"Defendant had a reasonable opportunity to reflect on his actions between the time of fondling the victim's breast and the time of raping her, and nevertheless continued the sexual[ly] [] assaultive behavior.

"Defendant is not eligible for probation because of his conviction for rape in concert. Probation is not appropriate in any event because of the nature of these crimes and the callousness of the defendant. Probation is denied.

"Under Penal Code Section 667.6, a full consecutive and separate term is authorized for a rape in concert. I find that sentencing under Penal Code Section 667.6 is appropriate in this case for the reasons already stated. Particularly because of the fact that the defendant took advantage of a vulnerable developmentally disabled victim who was also pregnant.

"For the crime of felony sexual battery in Count Two, defendant is [hereby] sentenced to State Prison for the upper term of four years consecutive to any other time. This is the principle term. I'm selecting the upper term because there are no mitigating circumstances to justify a low term, and because defendant's prior criminal record warrants a[n] upper term. [¶]
. . . [¶]

"As to the crime of felony rape in concert in Count One defendant is [hereby] sentenced to State Prison for the upper term of nine years consecutive to any other time.

"Again, I am selecting the upper term, and I am selecting a full, consecutive and separate term for Count One because of defendant's prior criminal record and for the other reasons previously stated, any one of which would justify an upper term sentence. The maximum term being imposed is 13 years in State Prison." (Italics added.)

In sum, the trial court imposed the upper terms on both convictions, stating its reasons for selecting the upper terms, namely, defendant's criminal record and the absence of any mitigating circumstances. The court also selected the sexual battery term of four years as the principle term, and imposed a full, consecutive term of nine years on the rape in concert, stating its reasons for proceeding under section 667.6.

Analysis

"Section 669 authorizes the court to decide whether sentences should run concurrently or consecutively. Subdivision (a) of section 1170.1 establishes a formula for computing the length of the aggregate term should the court impose consecutive sentences. Under that formula, the longest term for one offense, including enhancements, becomes the 'principal term,' and to it are added any 'subordinate terms' for the other offenses, limited to one-third of the middle term for each such offense. (§ 1170.1, subd. (a).)" (*People v. Jones* (1988) 46 Cal.3d 585, 592.)

Section 667.6 provides for longer prison terms for sex offenders who are convicted of certain enumerated sex offenses. These offenses, enumerated in subdivision (e), include forcible rape in concert in violation of section 264.1, but not sexual battery in violation of section 243.4, subdivision (a). (§ 667.6, subd. (e).)

Subdivision (c) of section 667.6 provides in relevant part: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term *may be imposed* for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of *at least one offense* specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment." (§ 667.6, subd. (c), italics added; see *People v. Hicks* (1993) 6 Cal.4th 784, 797 [holding this provision creates an exception to "section 654's general proscription against multiple punishment for offenses committed during an indivisible course of conduct"].)

Subdivision (d) of section 667.6 provides in relevant part: "A full, separate, and consecutive term *shall be imposed* for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." (§ 667.6, subd. (d), italics added.)

Accordingly, "where a defendant stands convicted of multiple felonies, subdivision (c) [of section 667.6] vests the sentencing court with discretionary authority to impose a full, consecutive term for any [enumerated sex offense] conviction, even when the defendant stands convicted of only one [enumerated sex offense]." (*People v. Jones, supra*, 46 Cal.3d at p. 600.) Whereas, subdivision (d) of section 667.6 "constitutes a mandatory consecutive sentencing scheme applicable only when a defendant has been convicted of *two or more* enumerated sex offenses." (*People v. Rojas* (1988) 205 Cal.App.3d 795, 799, original italics.)

In this case, defendant was convicted of one enumerated sex offense and one nonenumerated sex offense. Accordingly, full consecutive sentencing was not mandatory under subdivision (d) of section 667.6, but rather discretionary under subdivision (c). While the Attorney General concedes that the trial court erred by sentencing defendant pursuant to subdivision (d), we reject this concession. Indeed, the record affirmatively demonstrates that the trial court was proceeding under subdivision (c) in sentencing defendant to a full, consecutive term on the rape conviction.

First, in sentencing defendant, the trial court stated its reasons for proceeding under section 667.6: "*I find that sentencing under Penal Code Section 667.6 is appropriate in this case for the reasons already stated. Particularly because of the fact that the defendant took advantage of a vulnerable developmentally disabled victim who was also pregnant.*"

(Italics added.) This statement of reasons would not have been necessary had the court believed full, consecutive sentences to be mandatory under subdivision (d) of section 667.6.

In *People v. Belmontes* (1983) 34 Cal.3d 335 (*Belmontes*), our Supreme Court held "the decision to sentence under section 667.6, subdivision (c) is a 'sentence choice' for which reasons must be stated." (*Belmontes, supra*, at p. 347.) As the court explained: "In deciding whether to sentence consecutively or concurrently, and if consecutively, whether to do so under section 1170.1 or under the harsher full term provisions of subdivision (c) of section 667.6, the court is obviously making separate and distinct decisions." (*Belmontes, supra*, at p. 347.) Accordingly, the "decision to sentence under section 667.6, subdivision (c) is an additional sentence choice which requires a statement of reasons separate from those justifying the decision merely to sentence consecutively." (*Belmontes, supra*, at p. 347.) The court further explained: "What is required is an identification of the criteria which justify use of the drastically harsher provisions of section 667.6, subdivision (c). The crucial factor, in our view, is that the record reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c)." (*Belmontes, supra*, at p. 348.)

Here, as already indicated, the trial court specified the vulnerable nature of the victim as one of the reasons for proceeding under the harsher provisions of section 667.6. If

the court believed that full, consecutive sentencing was mandatory under subdivision (d) of section 667.6, there would have been no need to specify the reasons for doing so, as doing so would not have been a choice, but rather a requirement.

Second, both the probation report and the People's sentencing recommendation informed the court that subdivision (c) of section 667.6 was the appropriate vehicle for imposing full, consecutive terms. Indeed, the probation report, which the court "received and reviewed and considered," informed the court: "The defendant has been convicted of at least one violent sex crime and is subject to 667.6(c) P.C. sentencing. *Section 667.6(c) P.C. sentencing is discretionary for the Court.* Sentencing under 667.6(c) P.C. is recommended as the victim was particularly vulnerable (Rule 4.421(a)(3))." (Italics added.) The People's sentencing recommendation, also "received and reviewed" by the court, further explained to the court: "*Full strength consecutive sentencing is a discretionary sentencing choice pursuant to Penal Code section 667.6(c) as long as there is at least one forcible sex crime.* [Citation.] [¶] In contrast to Penal Code section 667.6(d), this discretionary scheme does not require a finding of separate occasions. Under this scheme, when there are multiple forcible sex crimes against the same victim on the same occasion the court may sentence the defendant to full strength, consecutive terms. . . . [¶] . . . [¶] *Because this is a harsher sentencing scheme than the usual principal/subordinate term scheme of Penal Code section 1170.1,*

the judge must state the reasons for exercising his or her discretion. [Citation.]” (Italics added.)

The confusion among the parties concerning which subdivision the trial court was utilizing appears to stem from the court’s statement that it was imposing a consecutive term on the sexual battery conviction. However, the court immediately clarified that the sexual battery term of four years was the principle term, and that it was imposing a full, consecutive term of nine years on the rape in concert. This was well within the trial court’s discretion under section 667.6, subdivision (c). As we have already indicated, the fact that the trial court stated its reasons for sentencing defendant under the harsher provisions of section 667.6, indicates that it was well aware of its discretion and did not erroneously proceed under subdivision (d).

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.